

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

DOBLER'S ROYAL IMPORTS, INC.

CASE NO. 91-02459

Debtor

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APPEARANCES:

KELLY & WALTHALL, P.C.  
Attorneys for Bank of Utica  
239 Genesee Street  
Utica, New York 13501

WILLIAM W. KELLY, ESQ.  
Of Counsel

HAROLD P. GOLDBERG, ESQ.  
Attorney for Debtor  
1408 W. Genesee Street  
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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

The Court considers the motion of the Bank of Utica ("Bank") seeking an order compelling abandonment of certain personal property, more specifically set forth in the moving papers, pursuant to §554(b) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"), as well as a lifting of the automatic stay pursuant to Code §362(d).

The motion appeared on the Court's calendar at Utica, New York on November 19, 1991 and was adjourned upon the consent of the parties to the Court's December 17, 1991 calendar at Syracuse, New York. At that time, the contested matter was submitted for decision without argument.

### JURISDICTIONAL STATEMENT

This Court has jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b) and 157(a)(b)(1) and (2)(A), (G).

### FACTS

The Bank's motion, which is unopposed by Marc S. Ehrlich, Esq., the Chapter 7 Trustee ("Trustee"), seeks to obtain both an order of abandonment and a lifting of the automatic stay to permit the Bank to continue with a seizure and sale of Debtor's personal property which was in progress at the time the Debtor filed its voluntary petition pursuant to Chapter 7 of the Code on September 9, 1991.

The Bank alleges that it was owed \$348,084.49 by Debtor pre-petition under a "floor plan" security agreement. It is further alleged that the personal property which the Bank seeks to seize and sell in accordance with the applicable provisions of the New York Uniform Commercial Code ("NYUCC"), has an appraised value of \$53,327.80.

Debtor has filed an Affirmation in Opposition in which it alleges that the Bank failed to perfect its security interest pre-petition and, therefore, its security interest is void as against the Trustee and other creditors.

### ARGUMENTS

The Debtor contends that the Bank failed to accurately identify the Debtor in the Financing Statements ("UCC-1's") filed in accordance with the applicable provisions of the NYUCC.

The Bank acknowledges that the UCC-1's identify the Debtor as "Dobler's Royal Imports" rather than "Dobler's Royal Imports, Inc.", however, the Bank asserts two arguments in support of its motion.

First, the Bank contends that as between itself and the Debtor it need only show that its security interest attached to the collateral, not that it has both attached and been perfected. Perfection, argues the Bank, is an issue which may only be raised by the Trustee or other creditors. Thus, the failure to properly identify the Debtor in the UCC-1's is an issue of perfection not attachment.

Second, the Bank argues that its failure to add "Inc." to Debtor's name in the UCC-1's is not a fatal defect, but simply a minor error and, thus, it has complied with both NYUCC §9-402(7) and (8).

### DISCUSSION

The threshold issue to be determined herein is whether or not the Debtor can oppose the relief sought by the Bank where the Trustee has abandoned any interest the estate might have in the collateral the Bank seeks to seize and sell.

Code §544 clearly provides the Trustee and a debtor in possession with the so-called "strong arm" powers to attack the validity of the Bank's security interest. In this case, however, the Trustee has taken no such action and the Debtor herein is not a debtor-in-possession.

The Code, however, does authorize a debtor to utilize the "strong arm" powers found in §544 in certain limited circumstances. Code §522(h) permits a debtor to avoid a transfer of property, utilizing Code §544 if the debtor could have exempted the property under §522(g)(1) and the trustee fails to attack the transfer. See In re Sullivan, 31 B.R. 125 (Bankr. N.D.N.Y. 1983); In re McMahon, 70 B.R. 290 (Bankr. N.D.N.Y. 1987).

Applying Code §522(b) to the instant facts it becomes apparent that the Debtor here cannot utilize that Code section to attack the Bank's security interest.

While it is true that the Trustee has not attempted to avoid the Bank's security interest, the Debtor is incapable of exempting the personal property subject to the Bank's security interest under Code §522(g)(1) since the granting of that security interest was a voluntary rather than involuntary transfer. Additionally, §282 of the New York Debtor and Creditor Law only allows exemptions to be claimed by an "individual" debtor not a corporate debtor. See Code §101(4l). In re Wimbish, 95 B.R. 379 (Bankr. W.D.Pa. 1989); In re Evingham, 27 B.R. 128 (Bankr. W.D.N.Y. 1983).

Thus, the Debtor herein cannot oppose the Bank's motion seeking to lift the stay upon the ground that it has failed to perfect that interest in accordance with NYUCC.

Having reached that conclusion, the Court need not consider the Bank's contention that its UCC-1's contain only minor errors which are not seriously misleading within the meaning of NYUCC §9-402(7) and (8).

Based upon the foregoing, it is

ORDERED that Marc S. Ehrlich, Esq., the Trustee, be and he hereby is authorized to abandon all that property of the estate as is more particularly described in the motion papers of the Bank and it is further

ORDERED that the automatic stay of Code §362(a) be and it is hereby modified to permit seizure from the Debtor and sale and/or collection under New York State law by the secured creditor Bank of the aforesaid collateral, and it is finally,

ORDERED that entry of this Order shall be deemed to constitute the abandonment of said property by the Trustee.

Dated at Utica, New York

this    day of

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STEPHEN D. GERLING  
U.S. Bankruptcy Judge